

RESPONSE

I. Status of the Claims

Prior to the second Action, claims 1-10, 12-25 and 33-45 were pending and have been examined. Although the second Action at page 2, item 2 is correct, the Summary page of the second Action therefore has an oversight in listing only claims 1-10, 12, 25 and 33-45 as pending. Pending and examined claim 42 is not subject to any rejection and should therefore have been indicated as allowable, but objected to as dependent on a rejected base claim. Although unlikely, any further rejection of claim 42 would have to be made as part of a non-final Office Action, being a new ground of rejection not necessitated by Applicants' amendment or untimely submission of references.

Presently, claims 33-36 have been amended without prejudice or disclaimer. No claims have been added and no claims have been canceled, although claims 1-10 and 12-25 can be canceled by Examiner's amendment once allowance of claims 33-45 is confirmed.

Claims 1-10, 12-25 and 33-45 are therefore in the case. According to 37 C.F.R. § 1.121(c), a copy of the pending claims is provided in the amendment section.

II. Support for the Claims

Support for the amended claims exists throughout the specification and claims of the original and parent applications, and the amendments were agreed in the telephone interview.

Claim 33 has been revised to replace "having" with "consisting of".

Claim 34 has been revised to recite that the "nucleic acid molecule is set forth as" the nucleotide sequence of SEQ ID NO:1, which is the language proposed by the Examiner in the telephone interview (see below).

Dependent claims 35 and 36 have been revised to be consistent with claim 33.

It will therefore be understood that no new matter is included within the pending claims.

III. Applicants Telephone Interview Summary

After review of the second Action, a number of telephone calls and interviews were held between Applicants' representative, Shelley Fussey, Examiner Baskar and SPE Lynette Smith of the Office, including a detailed telephone interview with Examiner Baskar on December 13, 2004. Applicants appreciate the examiners' time and the guidance provided.

Applicants' representative disagreed with the rejections of record, but agreement was reached that revising claim 33 to replace "having" with "consisting of" would place claims 33-45 in condition for allowance (conditional on consistent amendments and an interference search).

Therefore, aside from the interference search, agreement was reached on the scope of claims 33-45 for allowance. In order to progress the application to issue, particularly in light of patent term issues, this agreement is implemented by the present amendments, which in no way indicate acquiescence with any rejection. Claims 1-10 and 12-25 have not been canceled herein, but can be canceled by Examiner's amendment once the interference search has been conducted and allowance of claims 33-45 is confirmed.

Should the Examiner identify any informalities in the application, it was further agreed that Examiner Baskar will telephone the undersigned Applicants' representative so that any remaining issues can be efficiently resolved to secure allowance at the same time as claims 1-10 and 12-25 are canceled by Examiner's amendment.

IV. Entry of Amendments

The present amendments are entitled to entry after final rejection. The amendments place claims 33-45 in condition for allowance, as agreed in the telephone interview of December 13, 2004. The amendments to claims 33, 35 and 36 were agreed to render claims 33-45 allowable in

the telephone interview. The amendment to claim 34 was proposed by the Examiner, to which Applicants agreed. Thus, all amendments expressly adopt the examiner's directions for allowance, and are therefore entitled to entry after final rejection under 37 C.F.R. § 1.116(b).

The amendments are additionally entitled to entry after final rejection as the amendments have been agreed to secure allowance of claims 33-45 and could not have been earlier presented, being only necessitated by the erroneous summary of the case law and the MPEP section concerning the term "having" set forth in the final Action. The amendments are thus also acceptable after-final under 37 C.F.R. § 1.116(c).

V. Rejection of Claims 1-2, 7-10 and 12-25 Under 35 U.S.C. § 112, First Paragraph

Claims 1-2, 7-10 and 12-25 remain rejected under 35 U.S.C. § 112, first paragraph as allegedly lacking enabling support in the specification.

Although Applicants respectfully traverse, the Action's concerns are addressed. As agreed in telephone interview documented above, claims 1-2, 7-10 and 12-25 can be canceled by Examiner's amendment once the interference search has been conducted and allowance of claims 33-45 is confirmed.

The § 112, first paragraph rejection is therefore moot.

VI. Rejection of Claims 1-10 and 12-25 Under 35 U.S.C. § 112, Second Paragraph

Claims 1-10 and 12-25 also remain rejected under 35 U.S.C. § 112, second paragraph as allegedly being indefinite.

Although Applicants respectfully traverse, the Action's concerns are addressed. As agreed in telephone interview documented above, claims 1-10 and 12-25 can be canceled by Examiner's amendment once the interference search has been conducted and allowance of claims 33-45 is confirmed.

The § 112, second paragraph rejection is therefore moot.

VII. Rejection of Claims 1-8, 13, 14 and 16-19 Under 35 U.S.C. § 102(b)

Next, claims 1-8, 13, 14 and 16-19 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Dugger *et al.*, 1996 ("Dugger").

Applicants note that the anticipation rejections have been clarified slightly since the first Action.

As to the present rejection, although Applicants respectfully traverse, the Action's concerns are addressed. As agreed in telephone interview documented above, claims 1-8, 13, 14 and 16-19 can be canceled by Examiner's amendment once the interference search has been conducted and allowance of claims 33-45 is confirmed.

The § 102(b) rejection over Dugger is therefore moot.

VIII. Rejection of Claims 1-10, 12-19 and 21-23 Under 35 U.S.C. § 102(b)

Claims 1-10, 12-19 and 21-23 also remain rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Zhu *et al.*, 1996 ("Zhu").

Although Applicants respectfully traverse, the Action's concerns are addressed. As agreed in telephone interview documented above, claims 1-10, 12-19 and 21-23 can be canceled by Examiner's amendment once the interference search has been conducted and allowance of claims 33-45 is confirmed.

The § 102(b) rejection over Zhu is therefore moot.

IX. Rejection of Claims 1-10, 12-19 and 21-25 Under 35 U.S.C. § 102(b)

Claims 1-10, 12-19 and 21-25 further remain rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Jiang *et al.*, *Infect. Immun.*, 67:5848, 1999 ("Jiang").

Although Applicants respectfully traverse, the Action's concerns are addressed. As agreed in telephone interview documented above, claims 1-10, 12-19 and 21-25 can be canceled by Examiner's amendment once the interference search has been conducted and allowance of claims 33-45 is confirmed.

The § 102(b) rejection over Jiang is therefore moot.

X. Rejection of Claims 33-41 Under 35 U.S.C. § 102(b)

Additionally, claims 33-41 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Dugger.

The second Action at page 10 strongly implies that "having" is open-ended language and that this has been interpreted to have the same scope as "comprising" (although this is not actually supported by the case law). The interpretation of "having" as meaning the same as "comprising" was confirmed in the telephone interview of December 13, 2004. However, such as interpretation is not correct.

The section of the MPEP to which the second Action refers in fact clearly states that "phrases such as 'having' must be interpreted in light of the specification to determine whether open or closed claim language is intended" (see MPEP 2112, at page 2100-51, column 2; MPEP February, 2003). The case law provides the same guidance, holding that "having" must be interpreted in light of the specification and prosecution history to determine whether open or closed claim language is intended. In the present case, as Applicants had just replaced "comprising" with "having", the prosecution history does not reasonably indicate that "having" and "comprising" are the same, but rather indicates that "having" does not mean "comprising".

Nonetheless, as agreed in telephone interview documented above, the rejection is overcome by the language of claims 33-41 presented herein.

The § 102(b) rejection of claims 33-41 over Dugger is therefore overcome and should be withdrawn.

XI. Rejection of Claims 33-41 Under 35 U.S.C. § 102(b)

Further, claims 33-41, 43 and 44 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Zhu.

This rejection is also based on the improper conclusion regarding the meaning of "having" as set forth in the second Action at page 10 that, by way of example only, is contradicted in the section of the MPEP to which the second Action refers (see MPEP 2112, at page 2100-51, column 2; MPEP February, 2003).

In any event, as agreed in telephone interview documented above, the rejection is overcome by the language of claims 33-41, 43 and 44 presented herein.

The § 102(b) rejection of claims 33-41, 43 and 44 over Zhu is therefore overcome and should be withdrawn.

XII. Rejection of Claims 33-41 Under 35 U.S.C. § 102(b)

Finally, claims 33-41 and 43-45 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Jiang.

As with the rejections over Dugger and Zhu, this rejection is also based on the improper conclusion regarding the meaning of "having" as set forth in the second Action at page 10. This does not reflect the proper standard examination as shown, for example, by the section of the MPEP to which the second Action refers (see MPEP 2112, at page 2100-51, column 2; MPEP February, 2003).

Nonetheless, as agreed in telephone interview documented above, the rejection is overcome by the language of claims 33-41 and 43-45 presented herein.

The § 102(b) rejection of claims 33-41 and 43-45 over Jiang is therefore overcome and should be withdrawn.

XIII. Conclusion

This is a complete response to the referenced Official Action. In conclusion, Applicants submit that, in light of the agreement reached during the telephone interview, as documented herein, at least claims 33-45 are in condition for allowance and such action is respectfully requested. Should Examiner Baskar have any questions or comments, a telephone call to the undersigned Applicants' representative is earnestly solicited.

Respectfully submitted,
Williams, Morgan & Amerson, P.C.
Customer No. 23720



Shelley P.M. Fussey, Ph.D.
Reg. No. 39,458
Agent for Applicants

10333 Richmond, Suite 1100
Houston, Texas, 77042
(713) 934-4079

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